Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the matter of	)	
	)	
Implementation of Section 621(a)(1)	)	MB Docket No. 05-311
of the Cable Communications Policy Act	)	
of 1984 as amended by the Cable	)	
Television Consumer Protection and	)	
Competition Act of 1992	)	

REPLY COMMENTS OF THE INDEPENDENT MULTI-FAMILY COMMUNICATIONS COUNCIL (IMCC)

William J. Burhop
Independent Multi-Family Communications Council (IMCC)
3004 Oregon Knolls Dr., N.W.
Washington, D.C. 20015
(202) 364-0882

Dated: March 20, 2006

INTRODUCTION

The Independent Multi-Family Communications Council (IMCC) represents a cross-section of companies that provide telecommunications services to residents of the numerous types of multiple dwelling unit (MDU) communities. Members include Private Cable Operators (PCOs), shared tenant services providers, equipment manufacturers, program distributors, broadband Internet service providers (ISPs) and, importantly, residential property management and development companies. IMCC members employ a variety of communications technologies, including wired, wireless and direct broadcast satellite (DBS) transmission to provide analog/digital video, high-speed data connectivity and telephony services. IMCC members compete directly with franchised cable companies and incumbent local exchange carriers (LECs). Without the competition fostered by IMCC provider members, PCOs and DirecTV, and other emerging technology companies, MDU owners and managers, but primarily residents, would have little choice among providers and the benefits of competition would be diminished further, eliminating any incentive for the large franchised incumbents to provide quality products and services to residents.

It has been estimated that up to one-third of all Americans live in MDUs; there is no doubt that the viability of competition in MDU markets is a matter of national importance. As noted in the Commission's 2005 *Competition Report*, PCOs range in size from large operators with national reach, to small operators serving only a few communities. PCOs currently serve about 1.1 million subscribers, or approximately 5% of the national MDU market served by PCOs.

COMMENTS

IMCC takes no position on the central question posed in the *Notice of Proposed Rulemaking* (*NPRM),* namely, whether the cable franchising process, as currently implemented around the country, is "hindering the federal communications policy objectives of increased competition in the delivery of video programming and accelerated broadband deployment" and, if that is the case, whether and how the FCC can remedy the problem. However, IMCC does believe that regardless of how the Commission addresses the issue of franchising, it should carefully consider the consequences of its action on competition in MDU markets. The Commission should analyze the implications of any proposed regulatory change to ensure that its action does nothing to harm the PCO industry, and that any benefits realized by franchised cable companies and other competitors are equally available to PCOs. In particular, IMCC urges the Commission to consider the following:

1. <u>Any rule modifying the local franchising process must be so tailored that its benefits should accrue as much to Private Cable Operators as to any other communications provider.</u>

Most PCOs' business plans are based on the "private cable exemption" contained in federal statutory definition of "cable system" set forth in 47 U.S.C. § 522(7)(B). That definition, as amended by the 1996 Telecommunications Act, provides that the term "cable system" does not include "a facility that serves subscribers without using any public right of way." Operators using such exempt facilities need not operate under a cable television franchise pursuant to section 621.[1]

In order to fall within the "private cable" exemption, PCOs have largely confined their operations to situations where use of a public right of

[1] 47 U.S.C. § 541(b)(1) ("Except to the extent provided in paragraph (2) and subsection (f), a cable operator may not provide cable service without a franchise.").

way ("PROW") is not necessary, *i.e.,* MDU properties, condominiums, hotels, commercial multi-tenant buildings, and certain planned community developments. PCOs acquire programming, often from direct broadcast satellite (DBS) providers, and distribute it by means of a master antenna and head end centrally located at the subject property, and then fed to individual residents by means of terrestrial coaxial, hybrid fiber coaxial, or fiber-optic wiring.

As noted in the *NPRM*,[2] the State of Texas has recently enacted legislation[3] enabling new entrants in the video programming distribution marketplace to provide service pursuant to state-issued certificates of franchising authority. Similar legislation has been acted in Indiana and Virginia, and is being considered in Michigan, New Jersey, South Carolina, Missouri and in Congress. These cable franchise reform laws are being actively supported by large incumbent telephone companies who seek to enter local video distribution markets by deploying fiber-to-the-premises (FTTP) networks in communities across the country. While the Commission has no legal authority to roll back local franchising authority to that extent in this proceeding (and does not propose to do so), the *NPRM* requests comments on the state-wide certificate concept, including on "the impact of state-wide franchise authority on the ability of the competitive provider to access the market."[4]

There is no doubt that the cable franchising process erects barriers to competitive entry for PCOs in certain situations. For example, it is not unusual for two or more buildings in an apartment or condominium complex to be bisected by a public street. Similarly, many developers of planned unit developments (PUDs) – quasi-private housing developments – would like to

---

[2] *NPRM*, ¶ 9.
[3] TEX. UTIL. CODE ANN. § 66.03 (West 2005).
[4] *NPRM*, ¶ 12.

contract with PCOs for the provision of advanced communications services to homeowners within the PUD, but the PCOs are precluded from such opportunities because of the cable franchise requirement.

In these situations, residents are deprived of a choice among video providers because for most PCOs, anticipated revenue cannot justify the capital investment involved in installing separate headends at multiple locations to serve a limited number of subscribers within the MDU complex or PUD development. To the extent that the Commission's proposed reforms would enable PCOs to deploy their facilities across PROWs in the circumstances described without the need to negotiate a community-wide franchise agreement, IMCC supports those reforms. If telephone companies and/or cable television multiple systems operators (MSOs) are free to utilize PROWs under the authority of a state-wide or federal video certificate, this option should explicitly be made available to all providers in the marketplace, including PCOs.

2. If a state-wide video certificate system is adopted, franchise fees should only apply to those systems that actually utilize PROWs.

Under the new Texas and Indiana laws, as well as the other state franchise reform initiatives, the holder of a statewide video franchise must still pay a franchise fee – typically five percent of the operator's gross revenue – to each municipality or county within which the franchisee operates. Statewide franchise schemes should specify that the franchise fees owing to local governments should be based solely on revenue generated from video distribution systems that actually utilize PROWs within the locality, and not on revenue generated from systems located entirely on private property.

The *NPRM* notes that the "primary justification" for a cable franchise is "the locality's need to regulate and receive compensation for the use of public rights of way."[5] Because the five percent franchise fee is intended to compensate local communities for use of their PROWs, there is no rational basis for requiring operators to pay such a fee with respect to facilities that are located on private property and do not use PROWs. Regardless of whether local regulation of cable services under the LFA system is retained, modified or replaced by a state-wide video certificate system, franchise fees should be based solely on revenue generated from facilities that actually utilize PROWs.[6]

3. Any rule on franchising reform should preempt anti-competitive state and local mandatory access laws.

[5] *NPRM*, ¶ 22.

[6] The Texas law authorizing state-wide franchises appears to require that providers of "cable service" pay a franchise fee on all cable systems within the State, while requiring providers of "video service" to pay the fee only with respect to facilities that are located on a public right of way. In this way, the law places cable operators, including PCOs, at an unfair and irrational competitive disadvantage.

Any action undertaken to reform the cable franchise system should entail the elimination of unfair and irrational advantages conferred on incumbent cable franchisees under the current franchise system, advantages that only serve to undermine video competition in MDU markets. One such unfair and irrational competitive advantage is conferred on franchised cable operators under state and local "mandatory access" laws. The Commission should eliminate these advantages by preempting all such mandatory access laws and ordinances.

Some nineteen states currently have so-called mandatory access laws on the books.[7] In general, mandatory access laws give franchised cable operators a legal right to access MDU buildings for the purpose of providing cable service to residents without the building owner's consent. Such laws constitute an often insurmountable barrier to competitive entry by PCOs, because they in effect preclude MDU property owners from forming exclusive access agreements with PCOs. As IMCC has pointed out in the Commission's cable inside wiring proceedings, most PCOs require exclusive access in order to achieve the economies of scale needed to justify the capital investment in wiring MDU buildings.

Most mandatory access laws were enacted years ago, ostensibly as consumer protection measures, on the assumption that there was little if any competition in the market for multichannel video distribution. In the early days of cable television, before DBS distribution systems became widely available in the mid-1990s, there was a real possibility that some property owners might block the installation of cable facilities in MDU buildings, thus forcing their tenants to accept over-the-air television broadcasts or nothing at all.

---

[7] A list of State mandatory access laws can be found on the IMCC website, at http://www.imcc-online.org/ISSUES/RESOURCE%20Info/Mandatory%20Access/states.htm.

Needless to say, the competitive landscape has shifted dramatically since the 1980s and early 1990s, and today, as recent entry by telephone companies clearly demonstrates, the market for residential video services is highly competitive. In the current environment, it is almost inconceivable that a property owner would attempt to block her tenants' access to broadband communications generally, and to video in particular. For that reason, real effect of mandatory access laws has been transformed from that of facilitating competitive access by franchised cable operators to that of suppressing competitive entry by any provider other than franchised cable operators. MDU owners should be free to negotiate access agreements that are tailored to the specific needs of their residents in a competitive environment.

The Commission itself has "long recognized the anti-competitive effects of such discriminatory mandatory access statutes." In 2003, the Commission stated:

> We continue to believe that mandatory access laws may impede competition in the MDU marketplace and that they tend to preclude alternative (non-cable) MVPDs from executing MDU contracts. This is due to the fact that most mandatory access laws give the franchised cable operator a legal right to wire and remain in an MDU. The predictable result is that competitive providers are less likely to take the financial risk of entering, or to secure the necessary financial backing to enter, the MDU marketplace in a mandatory access state.[8]

Despite this recognition, the Commission has to this point declined to take any action to preempt these anti-competitive and discriminatory laws, on the assumption that the individual states would take corrective action. That has not happened, and the time has arrived for federal intervention.

---

[8] First Order on Reconsideration and Second Report and Order, *In the Matter of Telecommunications Services Inside Wiring*, CS Docket No. 95-184, MM Docket No. 92-260 (rel. Jan. 29, 2003), ¶ 38.

Any reform of the franchising process in the name of enhancing competitive entry should include federal preemption of the special building access rights granted to franchised cable operators.

4. <u>The Commission should abrogate perpetual MDU contracts that are tied to cable franchise renewals.</u>

Another relic of an earlier age that distorts competition in MDU markets, are perpetual-term MDU access agreements that are tied to cable franchise renewals. "Perpetual" access agreements are long-term contracts between franchised cable operators and MDU owners that automatically renew as long as the incumbent cable operator's franchise agreement is renewed. By virtue of words of inheritance contained with the agreements, such contracts automatically extend as long as there is a cable franchise for the local community, even when ownership of the cable system serving the MDU building has changed hands through a sale, bankruptcy or merger. Because most of these agreements provide the incumbent with exclusive access rights, they serve only as absolute barriers to entry, suppressing competition by monopolizing MDU markets, one building at a time, in perpetuity.

Most of these automatically renewing, franchised-based MDU contracts were signed by property owners before the mid-1990s, before DBS systems were widely available, and before the owner had any competitively significant choice among video providers. As with state mandatory access laws, such contracts today serve no purpose other than to block competitive entry by providers that are not franchised cable operators.

IMCC has raised this issue with the Commission in other proceedings, and is aware of the Commission's assumption that perpetual access agreements do not foreclose a significant portion of the MDU market, and are no longer being executed. IMCC does not agree with the first assumption, and the second assumption is irrelevant. During the late 1980s and early 1990s, many cable operators used standardized form contracts for MDU access, which include provisions giving the provider exclusive building access for a period of time equal to the duration of the incumbent's cable television franchise, including renewals thereof, into the indefinite future. IMCC receives numerous communications from property owners and managers complaining about perpetual lock-ins by cable incumbents, and asking how they can allow alternative providers to compete for subscribers within their buildings. Based on the frequency of these communications, IMCC believes that the problem is much more widespread than the Commission realizes. Moreover, the fact that few property managers are signing franchise-linked access agreements today does nothing to free up competition in tens of thousands of MDU buildings that are more than a few years old.

If the Commission is serious about ensuring that cable franchising does not create barriers to competitive entry into video distribution markets, it must revisit the issue of building access agreements that monopolize MDU markets in perpetuity via linkage to perpetually renewing local cable franchises.

CONCLUSION

IMCC welcomes the Commission's wide ranging inquiry into possible ways to reform the cable franchising process in order that all Americans may realize the full benefits of open ended competition in the delivery of multichannel video programming. Recognizing that as many as one-third of those Americans currently live in an MDU environment, it is essential that the Commission's initiative take into account the ways in which the franchising process, and its possible reform, affects the competitive viability of the one segment of the industry that specifically serves that MDU environment, namely, the PCO industry. Because a truly competitive market is more than a duopoly of cable and telephone giants, the ongoing viability of other entrants, including PCOs, should be one of the Commission's primary concerns in this proceeding.

Dated: March 20, 2006

By: ___________________________________

William J. Burhop, Executive Director, IMCC